

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-7145

orig
8/4

UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

DOCKET NUMBER 76-7145

BISWANATH HALDER

PLAINTIFF APPELLANT,

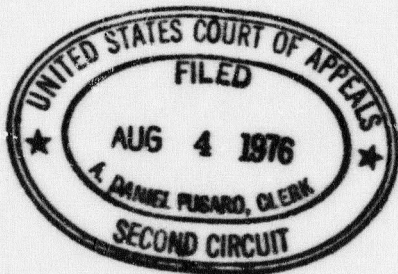
v

SPERRY RAND CORPORATION

DEFENDANT - APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF APPELLANT



BISWANATH HALDER

APPELLANT PRO SE

173-17 65 AVENUE

FRESH MEADOWS, NY 11365

TABLE OF CONTENTS

TABLE OF CASES	ii
ARGUMENT	i
POINT I DENIAL OF THE MOTION TO AMEND THE COMPLAINT WAS AN ABUSE OF DISCRETION	3
POINT II DENIAL OF THE MOTION TO COMPEL ANSWERS TO INTERROGATORIES WAS AN ABUSE OF DISCRETION	9
POINT III DISMISSAL OF THE COMPLAINT FOR LACK OF PROSECUTION WHILE THE APPELLANT HAS BEEN PROSECUTING IT VIGOROUSLY AND DILIGENTLY WAS AN ABUSE OF DISCRETION	12
CONCLUSION	17

TABLE OF CASES

1. ALMANCE INDUSTRIES, INC. V CILENFS,	
291 F.2D 142, CA 1 1961.	15
2. CARNEGIE NATIONAL BANK V CITY OF WOLF	
POINT, 110 F.2D 569, CA 9 1940.	13
3. GILL V STOLOW. 240 F.2D 669, CA 2 1957.	16
4. INDUSTRIAL BUILDING MATERIALS, INC. V	
INTERCHEMICAL CORPORATION, 437 F.2D 1336,	
CA 9 1970.	12
5. JOHNSON V RAILWAY EXPRESS AGENCY, 1975,	
421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295.	7
6. JOHNSON V UNIVERSITY OF PITTSBURGH,	
359 F.Supp. 1002, WD PA 1973.	2
7. LINK V WABASH RAILROAD COMPANY, 1962,	
370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734.	12
8. MCCOMBS V PITTSBURGH - DES MOINES STEEL	
COMPANY, 426 F.2D 264, CA 10 1970.	12
9. MEUCICH V UNITED STATES, 1871, 78 U.S.	
(11 WALLACE) 259, 20 L.Ed. 50.	15

10. PEARSON V CHAPMAN, 169 F.2D 909, CA 3 1948. . 13
11. PETERSON V TERM TAXI, INC., 429 F.2D 888.
CA 2 1970. 12
12. SWAN LAND & CATTLE COMPANY V FRANK, 1893,
148 U.S. 603, 13 S.Ct. 691, 37 L.Ed. 577. . . . 13
13. SYRACUSE BROADCASTING CORPORATION V
NEWHOUSE, 271 F.2D 910, CA 2 1959. 13
14. TAKAHASHI V FISH & GAME COMMISSION, 1948,
334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478. . . . 6
15. WINDSOR V HEVEIGH, 1876, 93 U.S. (23
WALLACE) 274, 23 L.Ed. 914. 15

ARGUMENT

IN ORDER TO MAKE CERTAIN THAT THE RECORD IS CLEAR, AND ALSO TO HAVE AFFIRMATIVE PROOF IN SUPPORT OF ITS DEFENSE, THE TRIAL JUDGE DIRECTED THE CORPORATE DEFENDANT TO PUT THE CASE IN. TRIAL TRANSCRIPT DATED FEBRUARY 10, 1976, PAGE 24. SPERRY RAND PUT ON THE STAND ITS PERSONNEL ADMINISTRATOR, FRANK DOUGLAS ADAMS. ALL THAT ADAMS TESTIFIED WAS THAT, WHILE REJECTING THE PLAINTIFF'S NUMEROUS EMPLOYMENT APPLICATIONS, THE DEFENDANT DID NOT TAKE INTO ACCOUNT HIS COLOR, RELIGION, NATIONAL ORIGIN, AND ALIENAGE. BUT THE BILLION-DOLLAR CORPORATE DEFENDANT, SPERRY RAND CORPORATION, AS WELL AS ITS ARDENT AND FAITHFUL DEFENDANT, FEDERAL JUDGE JACOB MISHLER, ARE EXTREMELY WELL AWARE THAT THE BOARD OF DIRECTORS OF A DEFENDANT COMPANY SELDOM AGREES "TO

ENGAGE IN ... DISCRIMINATION ANY MORE THAN WE WOULD EXPECT TO FIND THE SAME IN A CONSPIRACY TO VIOLATE THE ANTITRUST LAWS." JOHNSON V UNIVERSITY OF PITTSBURGH, 359 F. SUPP. 1002, 1007, WD PA 1973.

THE ONLY AFFIRMATIVE PROOF THE CORPORATE DEFENDANT CAN SUBMIT TO THE COURT ARE THE RESUMES OF THE PROGRAMMERS AND ANALYSTS HIRED BY IT SINCE 1969. AND THE ONLY WAY THE RECORD CAN BE MADE CLEAR IS BY SHOWING THAT THE SUCCESSFUL APPLICANTS' QUALIFICATIONS EXCEEDED THOSE OF THE UNSUCCESSFUL PLAINTIFF.

POINT I DENIAL OF THE MOTION TO AMEND
THE COMPLAINT WAS AN ABUSE
OF DISCRETION

THE JUDGE ASSERTS THAT THE APPELLANT OFFERS NO FACTUAL ALLEGATION TO SUBSTANTIATE HIS CLAIM OF DISCRIMINATION ON GROUND OF NATIONAL ORIGIN :

"PLAINTIFF MUST BELIEVE THAT FROM HIS NAME, DEFENDANT SURMISED PLAINTIFF WAS AN INDIAN NATIONAL AND, DUE TO DEFENDANT'S ALLEGED POLICY OF DISCRIMINATION AGAINST PEOPLE FROM INDIA, REFUSED TO HIRE HIM." HALDER V REA, 74 CIVIL 1375, ED OF NY, MEMORANDUM OF DECISION AND ORDER OF 02.09.1976, PAGE 2.

ALSO, THE JUDGE DENIED THE APPELLANT LEAVE TO AMEND THE COMPLAINT TO INCLUDE A CAUSE OF ACTION UNDER THE CIVIL RIGHTS ACT OF 1866, AS AMENDED, 42 USCA 1981, AS WELL AS TO ADD, COLOR, RELIGION, AND

ALIENAGE AS GROUNDS OF DISCRIMINATION, BECAUSE THE APPELLANT'S SPECULATION THAT THE APPELLEE USED HIS NAME AS A BASIS FOR A CHARGE OF DISCRIMINATORY EMPLOYMENT PRACTICES IS INSUFFICIENT AS A MATTER OF LAW.

"PLAINTIFF MADE NO MENTION OF COLOR, RELIGION OR ALIENAGE AND NOW OFFERS NO THEORY AS TO HOW DEFENDANT MIGHT HAVE BEEN ABLE TO ASCERTAIN PLAINTIFF'S COLOR, RELIGION OR CITIZENSHIP IN ORDER TO DISCRIMINATE AGAINST THEM." HALDER V AVIS, 74 CIVIL 1552, ED OF NY, MEMORANDUM OF DECISION AND ORDER OF 01-22-1976, PAGE 3.

HOWEVER, THE APPELLEE DOES ADMIT THAT THE APPELLANT INCLUDED HIS NATIONAL ORIGIN AND CITIZENSHIP IN HIS RESUME, BUT "MADE NO MENTION OF HIS COLOR OR RELIGION," AND "NOW OFFERS NO THEORY AS TO HOW SPERRY RAND MIGHT HAVE BEEN ABLE TO ASCERTAIN HIS COLOR OR RELIGION IN ORDER TO DISCRIMINATE AGAINST

HIM." APPELLEE'S BRIEF, PAGE 33.

THE APPELLANT MAY RESPECTFULLY POINT OUT THAT ONLY THOSE OF EUROPEAN ORIGIN ARE CLASSIFIED AS WHITE. PERSONS OF ASIATIC AND AFRICAN ORIGIN FALL INTO THE CATEGORIES OF YELLOW, OR BROWN, OR BLACK. ANTHROPOLOGISTS, AS IS WIDELY KNOWN, CLASSIFY THE INDIANS AS BROWN.

THE APPELLANT MAY FURTHER RESPECTFULLY POINT OUT THAT THE NAME BISWANATH IS NOT A CHRISTIAN NAME. ONE WITH DEEPER KNOWLEDGE OF THE SUBJECT WOULD UNDERSTAND THAT THE NAME IS DERIVED FROM SANSKRIT — BISWA (UNIVERSE) + NATH (LORD) — AND ONLY HINDUS HAVE SANSKRIT NAMES.

THE APPELLEE DID MENTION THAT, IN HALDER V REA, 74 CIVIL 1375, ED OF NY, "THE DISTRICT COURT DENIED THE MOTION [TO AMEND THE COMPLAINT TO INCLUDE A CAUSE OF ACTION UNDER SECTION 1981] ON THE BASIS

OF ITS ANALYSIS OF LEGISLATIVE HISTORY AND COURT DECISIONS." APPELLEE'S BRIEF, PAGE 30.

WHAT THE APPELLEE FORGOT TO MENTION WAS THAT THE APPELLANT, IN HIS SUPPLEMENTAL AFFIDAVIT OF 04-03-1975 AGAINST REA, APART FROM CITING MORE THAN HALF A DOZEN LOWER COURT CASES, WHERE THE LOWER COURTS HAVE RULED THAT NON-WHITES AND NON-CITIZENS CAN BRING ACTION UNDER SECTION 1981, ALSO CITED A SUPREME COURT DECISION, TAKAHASHI V FISH & GAME COMMISSION, 1948, 334 U.S. 410, 68 S.Ct. 1138, WHERE THE SUPREME COURT RULED THAT "THE PROTECTION OF THIS SECTION HAS BEEN HELD TO EXTEND TO ALIENS AS WELL AS TO CITIZENS." 18, 334 U.S. at 419, 68 S.Ct. at 1142, 1143.

INSPIRE OF THAT, THE TRIAL COURT RULED THAT "SECTION 1981 IS ... CLEARLY LIMITED TO RACIAL DISCRIMINATION, AND NOT TO OTHER FORMS OF DISCRIMINATION." HALDER V REA, 76 CIVIL 1375, ED OF NY. MEMORANDUM

OF DECISION AND ORDER OF 04-25-1975, PAGES 10&11.

SOMEHOW, THE APPELLEE HAS ALSO FORGOT TO MENTION THAT THE SOLE PURPOSE OF THAT DELIBERATE AND WILLFUL VIOLATION OF THE SUPREME COURT'S INTERPRETATION OF THE STATUTE BY THE TRIAL JUDGE, WAS TO DEFEND AND PROTECT THE UNLAWFUL AND ILLEGAL POLICIES AND PRACTICES OF THE MULTI-NATIONAL AND MULTI-BILLION CORPORATE DEFENDANTS.

IT IS WELL ESTABLISHED THAT TITLE VII AND SECTION 1981 "ALTHOUGH RELATED, AND ALTHOUGH DIRECTED TO MOST OF THE SAME ENDS, ARE SEPARATE, DISTINCT, AND INDEPENDENT." JOHNSON V RAILWAY EXPRESS AGENCY, 1975, 421 U.S. 454, 461, 95 S.Ct. 1716, 1721. AND MOREOVER, "THE FILING OF A TITLE VII CHARGE AND RESORT TO TITLE VII'S ADMINISTRATIVE MACHINERY ARE NOT PREREQUISITES FOR THE INSTITUTION OF A SECTION 1981 ACTION." ID., 421 U.S. at 460, 95 S.Ct. at 1720.

THE JUDGE IS EXTREMELY WELL AWARE
THAT LEAVE TO AMEND A PLEADING IS FREELY
GIVEN WHEN JUSTICE SO REQUIRES. HE SAID
TO THE COUNSEL FOR THE APPELLEE ON
DECEMBER 20, 1974 :

"SUPPOSE [THE APPELLANT] LATER FINDS
SOMETHING ELSE THAT HE LEFT OUT AND HE
WANTS TO AMEND. AM I GOING TO PRECLUDE
HIM BECAUSE HE'S A PRO SE PETITIONER ?
... ALL I CAN SAY IS THAT I FIND NO
REASON FOR NOT PERMITTING HIM TO AMEND
THE SECOND TIME OR A THIRD OR FOURTH
TIME." TRANSCRIPT OF 12.20.1974, PAGE 13.

POINT II DENIAL OF THE MOTION TO COMPEL
ANSWERS TO INTERROGATORIES WAS
AN ABUSE OF DISCRETION

THE INTERROGATORIES PROPOUNDED BY THE APPELLANT PRIMARILY CALL FOR THE QUALIFICATIONS OF THE PROGRAMMERS AND ANALYSTS HIRED BY THE APPELLEE SINCE 1969. THE APPELLEE OBJECTED TO ON GROUNDS OF BURDENSOMENESS AND OPPRESSIVENESS. NOTWITHSTANDING THESE OBJECTIONS, THE "COUNSEL FOR [THE APPELLEE] ASKED [THE APPELLANT] TO COME DOWN TO [THE APPELLEE'S] EXECUTIVE OFFICES, AND EXAMINE AND COPY . . . THE EMPLOYMENT APPLICATIONS AND RELATED RECORDS . . . LOCATED AT THE SAID ADDRESS. THIS OFFER MADE BY THE COUNSEL FOR [THE APPELLEE] IS MERELY A GESTURE WITHOUT SUBSTANCE, BECAUSE [THE APPELLEE] HAS NO COMPUTER PROGRAMMER AT ITS EXECUTIVE OFFICES . . .

OBVIOUSLY, THE COUNSEL FOR [THE APPELLEES] OFFER WAS MORE IN THE NATURE OF A EYEWASH THAN ANYTHING ELSE." PLAINTIFF'S MEMORANDUM OF LAW DATED JUNE 21, 1975, PAGES 7 & 8.

"WHEN [THE APPELLANT] CAME TO AMERICA, [HE] HAD A BACHELOR'S DEGREE [IN ELECTRICAL ENGINEERING] AND EXPERIENCE [IN WRITING COMPUTER PROGRAMS FOR TWO YEARS] WITH TWO OF THE FIVE LARGEST COMPUTER MANUFACTURERS OF THE WORLD. AT THAT TIME [THE APPELLANT] ^{APPLIED} TO ALL THESE [CORPORATE DEFENDANTS] [FOR A JOB] WITHOUT ANY PRETRIAL DISCOVERY, [THE APPELLANT] [HAS] ONLY ONE PIECE OF DOCUMENT WITH [HIM] [EXHIBIT A] WHICH SAYS THAT [AT THAT TIME] [SPERRY RAND] HIRED A PERSON [RICHARD KIRSCHENBAUM] WHO JUST CAME OUT OF COLLEGE [CITY COLLEGE OF NEW YORK] WITH A BACHELOR'S DEGREE [IN ELECTRICAL

ENGINEERING], AND ZERO YEARS OF EXPERIENCE IN INDUSTRY. BY THE TIME [THE APPELLANT] CAME TO COURT, [SPERRY RAND] TOLD [HJM] [HE IS] AN ERSTWHILE COMPUTER PROGRAMMER.

... THIS PERSON, HE HAD FIVE YEARS OF EXPERIENCE IN COMPUTER INDUSTRY. HIS SALARY WAS \$17,328. ONCE THE DISCOVERY IS COMPLETE [THE APPELLANT] SHOULD BE ABLE TO PRODUCE HUNDREDS AND HUNDREDS OF SUCH DOCUMENTS, MAY BE THOUSANDS, AND THAT'S GOING TO PROVE, IN THE LAST SIX YEARS, THEY HAVE HIRED HUNDREDS AND HUNDREDS, OR THOUSANDS OF COMPUTER PROGRAMMERS, WHO WERE LESS QUALIFIED THAN [THE APPELLANT]." TRIAL TRANSCRIPT, PAGES 21, 22 & 23.

THE APPELLANT DEMANDS REVERSAL OF THE INSTANT APPEAL, AND A FAIR TRIAL UPON FULL AND COMPLETE DISCLOSURE OF THE QUALIFICATIONS AND EXPERIENCES OF ALL THE PROGRAMMERS AND ANALYSTS HIRED BY THE APPELLEE OVER THE LAST SEVEN YEARS.

POINT III DISMISSAL OF THE COMPLAINT FOR
LACK OF PROSECUTION WHILE THE
APPELLANT HAS BEEN PROSECUTING
IT VIGOROUSLY AND DILIGENTLY WAS
AN ABUSE OF DISCRETION

IN THE CASES CITED BY THE APPELLEE,
WHERE THE APPELLATE COURTS HAVE AFFIRMED
LOWER COURTS' DISMISSAL OF THE COMPLAINTS
FOR LACK OF PROSECUTION, THE FACTS DO
DEPICT "A DRAWN-OUT HISTORY" OF "DELIBERATELY
PROCEEDING IN DILATORY FASHION." LINK V
WABASH RAILROAD COMPANY, 1962, 370 U.S. 626,
633, 82 S.Ct. 1386, 1390.

OTHERWISE, THE APPELLATE COURTS HAVE
UNIFORMLY REVERSED THE TRIAL COURTS.
INDUSTRIAL BUILDING MATERIALS, INC. V
INTERCHEMICAL CORPORATION, 437 F.2d 1336,
CA 9 1970 ; PETERSON V TERM TAXI, INC.,
429 F.2d 888, CA 2 1970 ; MCCOMBS V

PITTSBURGH - DES MOINES STEEL COMPANY, 426
F. 2d 264. CA 10 1970 ; SYRACUSE BROADCASTING
CORPORATION V NEWHOUSE, 271 F.2d 910, CA
2 1959 ; PEARSON V CHAPMAN, 169 F.2d 909,
CA 3 1948, CARNEGIE NATIONAL BANK V CITY
OF DOLF POINT, 110 F.2d 569. CA 9 1940.
BECAUSE RULE 41(b) OF THE FEDERAL RULES
OF CIVIL PROCEDURE HAS DIRECTLY REVERSED
EQUITY'S TRADITIONAL DOCTRINE THAT A
DISMISSAL WITHOUT CONSIDERATION OF THE
MERITS IS ALSO WITHOUT PREJUDICE TO THE
COMPLAINANT. SWAN LAND & CATTLE COMPANY
V FRANK, 1893, 148 U.S. 603, 612, 13 S.Ct. 691, 694.

IN THE INSTANT ACTION, THE APPELLANT
HAS BEEN VIGOROUSLY AND DILIGENTLY
PROSECUTING HIS CLAIM THROUGHOUT. IN JUNE
1975, THE TRIAL COURT DENIED THE APPELLANT'S
MOTION TO COMPEL THE APPELLEE TO ANSWER
CERTAIN INTERROGATORIES. IMMEDIATELY
THEREAFTER, THE APPELLANT MOVED FOR A

REARGUMENT OF THE SAID MOTION. THE TRIAL COURT DECLINED TO RULE ON THE SAID MOTION FOR NEARLY 2X120 DAYS, IN GROSS DISREGARD OF SECTION 706(b)(5) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 USCA 20002-5(b)(5).

IMMEDIATELY AFTER THE APPELLANT MOVED TO THE COURT OF APPEALS AGAINST THE DENIAL OF A PRELIMINARY INJUNCTION AGAINST ANIS (DOCKET NUMBER 76-7039), THE TRIAL COURT FELT THE URGE OF DISMISSING THE APPELLANT'S CLAIM, AND SCHEDULED THE HALDER ACTIONS FOR DISMISSAL (ANY MAN WITH WISDOM WOULD COME TO THE SAME CONCLUSION IF HE LOOKS AT THE NEW YORK LAW JOURNAL OF 02-10-1976).

AT THE TRIAL FOR DISMISSAL, SPERRY RAND, QUOTRON, AND INFORMATICS WERE READY TO PROCEED; RCA, GENERAL TELEPHONE, AND ITT WERE NOT. THE APPELLANT CROSS-MOVED FOR SUMMARY JUDGMENT AGAINST THE LATTER

THREE. THOSE THREE FILES ARE BEAUTIFUL ;
THEY DO NOT WANT THE COURT OF APPEALS TO ^{SEE}
THOSE FILES NOW (THE COURT OF APPEALS
HAS ALREADY SEEN ONE BEAUTIFUL FILE —
AVIS, 76 CIVIL 1552, ED OF NY).

THE DISMISSAL OF THE COMPLAINT, AS IS
ABUNDANTLY CLEAR, WAS "CONTRARY TO THE
FIRST PRINCIPLES OF THE SOCIAL COMPACT,
AND OF THE RIGHT ADMINISTRATION OF JUSTICE."
MCVEIGH V UNITED STATES, 1871, 78 U.S. (11
WALLACE) 259, 267. "IT WAS, IN FACT, A
MERE ARBITRARY EDICT, CLOTHED IN THE
FORM OF A JUDICIAL SENTENCE." WINDSOR V
MCVEIGH, 1876, 93 U.S. (23 WALLACE) 276, 278.

THE JUDGE SHOULD EVER BE MINDFUL
THAT THE "COURTS EXIST TO SERVE THE PARTIES
AND NOT TO SERVE THEMSELVES, OR TO
PRESENT A RECORD WITH RESPECT TO DISPATCH
OF BUSINESS." ALMANZEE INDUSTRIES, INC. V
FILENE'S. 291 F.2D 142, 146, CA 1 1961. "A

COURT HAS THE RESPONSIBILITY TO DO JUSTICE
BETWEEN MAN AND MAN ; AND GENERAL
PRINCIPLES CANNOT JUSTIFY DENIAL OF A
PARTY'S FAIR DAY IN COURT EXCEPT UPON
A SERIOUS SHOWING OF WILFUL DEFAULT."

GILL V STOLOW, 240 F.2D 669, 670, CA 2 1957.

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD
IN ITS ENTIRETY, BE REVERSED.

RESPECTFULLY SUBMITTED.

Biswanath Halder
Oppellant Pro Se

BISWANATH HALDER
173-17 65 AVENUE
FRESH MEADOWS, NY 11365
TELEPHONE : 212-539-2305

DATED : Queens, New York
August 2, 1976

RICHARD KIRSCHENBAUM

Scientist

1026 Bloomsfield Avenue

West Caldwell, N. J. 07006

(201) 575 - 1138

27 years of age

5'8" 150 lbs.

Married, no children

Clearance: Secret

EMPLOYMENT OBJECTIVE: Systems Analyst

EMPLOYMENT HISTORY:

April 1972

Systems Analyst - Computer Generation, Inc., 3781 N. E. Expressway
to Present Atlanta, Georgia 30340, Assigned to Bell Telephone Laboratories,
Whippany, New Jersey.

ARMAY Design Group - Scientific Programmer/Analyst Implementing
engineering equations with graphic output. Dual IBM 370/168
OS ASP TSO FORTRAN IV and Assembly Language. Write own JCL.

Display Processing Software Group - development of a Real -
Time System. Wrote on - line interactive graphic programs. Univac
Exec 8 Assembly Language FORTRAN V. Provided debugging and
consulting services to users of FORTRAN, Assembly Language and the

June 1969 to

Associate Engineer - Sperry Gyroscope, Great Neck, New York.

April 1972

Advanced Radar Studies Group - Scientific programming
simulation of Real - Time Radar Control and Video Data Processor.
Wrote data reduction programs with graphic output and special
Tape I/O programs. Department expert in the use of the Exec.
Univac 1108 Exec 8 FORTRAN V and Assembly Language. Familiar
with radar control programs on Honeywell DDP 516 computer.
Assisted in logic design and installation of CRT display console.

BEST COPY AVAILABLE

EXHIBIT "A"

GOVERNMENT
EXHIBIT

74C 1069

Cop. Received

POLETTI FLEMMING FLEMMING & PARTNER

Attorneys for Defendant

Date 8/4/76

Time 3:30